

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ZURICH AMERICAN INSURANCE
COMPANY,

Plaintiff,

v.
BLU HOMES, INC.,

Defendant.

No. 2:21-cv-01543 KJM AC

FINDINGS AND RECOMMENDATIONS

This matter is before the court on plaintiff's motion for default judgment. ECF No. 10. The motion was referred to the undersigned pursuant to E.D. Cal. R. 302(c)(19), and was set for hearing on the papers February 9, 2022. ECF No. 11. Defendant did not appear or file an opposition. For the reasons set forth below, the undersigned recommends plaintiff's motion be GRANTED, and that judgment be entered in favor of plaintiff.

I. Relevant Background

Plaintiff Zurich American Insurance Company ("ZAIC") brought its complaint on August 27, 2021, alleging breach of contract and asserting that defendant owes \$328,833.20 in unpaid policy premiums for a workers compensation policy renewal. ECF No. 1 at 3-6. Plaintiff alleges it is a New York corporation engaged in the insurance business with a statutory home office located at One Liberty Plaza, 165 Broadway, 32nd Floor, New York, New York 10006, and its

1 principal place of business located at 1299 Zurich Way, Schaumburg, Illinois 60196, and that
2 defendant Blu Homes is a California corporation with its principal place of business located at
3 1015 Walnut Avenue, Vallejo, CA 94592. Id. at 1-2. Jurisdiction in this court is based on
4 diversity pursuant to 28 U.S.C. § 1332. Id. at 2.

5 A summons was issued to defendant on August 30, 2021. ECF No. 4. The summons was
6 returned executed on September 13, 2021. ECF No. 6. Defendant did not appear, and plaintiff
7 moved for entry of default on October 12, 2021. ECF No. 7. The Clerk entered default on
8 October 13, 2021. ECF No. 8. Plaintiff moved for default judgment on January 8, 2022. ECF
9 No. 10. Plaintiff filed an affidavit of service by mail of the motion upon defendant. ECF No. 10-
10 5. Defendant did not respond to the motion for entry of default judgment and has not otherwise
11 appeared in this case.

12 **II. Motion**

13 Plaintiff moves for default judgment in the total amount of \$351,972.88 (\$328,833.20 in
14 principal damages for unpaid insurance premium and deductible, \$22,702.68 in prejudgment
15 interest, and \$437.00 in statutory costs) in favor of ZAIC and against Blu Homes. As noted
16 above, Blu Homes has not appeared or filed any response.

17 The complaint alleges that at defendant's request, plaintiff issued Workers Compensation
18 insurance policy no. WC- 5899178-01 (which was a renewal) to defendant for the policy period
19 May 1, 2014 to May 1, 2015 (the "Agreement"). ECF No. 1 at 3. Plaintiff provided workers
20 compensation insurance coverage to defendant pursuant to the Agreement. Id. Pursuant to the
21 terms of the Agreement, the initial premium charged for the policy was an estimate subject to
22 adjustment based on a payroll and remuneration audit to be performed after the conclusion of the
23 policy period. Id. A payroll audit was completed by Plaintiff of Defendants' payroll records after
24 the conclusion of the policy term. Id. Plaintiff alleges that as a result of the payroll audit, and per
25 the Agreement, an additional premium was due by defendant to plaintiff totaling \$319,836.00. Id.
26 On or about October 8, 2015, plaintiff sent the payroll audit results to defendant along with
27 demand for payment of an additional insurance premium totaling \$319,836.00. Id. Pursuant to
28 the Agreement, defendant also owed a deductible for handling workers compensation claims, and

1 or about July 20, 2018, an invoice was sent by Plaintiff to Defendants for a deductible owed of
2 \$24,997.20. Id.

3 On or about April 9, 2021, plaintiff determined that defendant was entitled to a credit
4 against the amount of additional premium owed after payroll audit, reducing that amount from
5 \$319,836.00 to \$303,836.00. Id. at 4. On or about April 9, 2021, plaintiff sent defendant a
6 Statement of Account and demand for payment of \$303,836.00 in additional premium, plus
7 \$24,997.20 for a deductible, for a total of \$328,833.20 owed by defendant to plaintiff pursuant to
8 the terms of the Agreement, but received no payment. Id. On or about May 13, 2021, plaintiff
9 sent defendant a follow up demand for payment of the \$328,833.20 owed pursuant to the terms of
10 the Agreement but received no payment. Id.

11 With the motion for default judgment, plaintiff submitted copies of invoices, including a
12 May 13, 2021 letter demanding payment of the balance due \$328,833.20. ECF No. 10-2.

13 III. Analysis

14 A. Legal Standard

15 Pursuant to Federal Rule of Civil Procedure 55, default may be entered against a party
16 against whom a judgment for affirmative relief is sought who fails to plead or otherwise defend
17 against the action. See Fed. R. Civ. P. 55(a). However, “[a] defendant’s default does not
18 automatically entitle the plaintiff to a court-ordered judgment.” PepsiCo, Inc. v. Cal. Sec. Cans,
19 238 F.Supp.2d 1172, 1174 (C.D. Cal. 2002) (citing Draper v. Coombs, 792 F.2d 915, 924-25 (9th
20 Cir. 1986)); see Fed. R. Civ. P. 55(b) (governing the entry of default judgments). Instead, the
21 decision to grant or deny an application for default judgment lies within the district court’s sound
22 discretion. Aldabe v. Aldabe, 616 F.2d 1089, 1092 (9th Cir. 1980). In making this
23 determination, the court may consider the following factors:

24 (1) the possibility of prejudice to the plaintiff; (2) the merits of plaintiff’s
25 substantive claim; (3) the sufficiency of the complaint; (4) the sum of money at stake
in the action; (5) the possibility of a dispute concerning material facts; (6) whether
the default was due to excusable neglect; and (7) the strong policy underlying the
Federal Rules of Civil Procedure favoring decisions on the merits.

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1 Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986). Default judgments are ordinarily
2 disfavored. Id. at 1472.

3 As a general rule, once default is entered, well-pleaded factual allegations in the operative
4 complaint are taken as true, except for those allegations relating to damages. TeleVideo Sys., Inc.
5 v. Heidenthal, 826 F.2d 915, 917-18 (9th Cir. 1987) (per curiam) (citing Geddes v. United Fin.
6 Group, 559 F.2d 557, 560 (9th Cir. 1977) (per curiam)); see also Fair Housing of Marin v.
7 Combs, 285 F.3d 899, 906 (9th Cir. 2002). Although well-pleaded allegations in the complaint
8 are admitted by a defendant’s failure to respond, “necessary facts not contained in the pleadings,
9 and claims which are legally insufficient, are not established by default.” Cripps v. Life Ins. Co.
10 of N. Am., 980 F.2d 1261, 1267 (9th Cir. 1992) (citing Danning v. Lavine, 572 F.2d 1386, 1388
11 (9th Cir. 1978)); accord DIRECTV, Inc. v. Huynh, 503 F.3d 847, 854 (9th Cir. 2007) (“[A]
12 defendant is not held to admit facts that are not well-pleaded or to admit conclusions of law”)
13 (citation and quotation marks omitted); Abney v. Alameida, 334 F.Supp.2d 1221, 1235 (S.D. Cal.
14 2004) (“[A] default judgment may not be entered on a legally insufficient claim.”). A party’s
15 default conclusively establishes that party’s liability, although it does not establish the amount of
16 damages. Geddes, 559 F.2d at 560; cf. Adriana Int’l Corp. v. Thoeren, 913 F.2d 1406, 1414 (9th
17 Cir. 1990) (stating in the context of a default entered pursuant to Federal Rule of Civil Procedure
18 37 that the default conclusively established the liability of the defaulting party).

19 B. The Eitel Factors

20 1. Factor One: Possibility of Prejudice to Plaintiff

21 The first Eitel factor considers whether the plaintiff would suffer prejudice if default
22 judgment is not entered, and such potential prejudice to the plaintiff weighs in favor of granting a
23 default judgment. See PepsiCo, Inc., 238 F.Supp.2d at 1177. Here, plaintiff would suffer
24 prejudice if the court did not enter a default judgment because it would be without recourse for
25 recovery. Accordingly, the first Eitel factor favors the entry of default judgment.

26 2. Factors Two and Three: Merits of Claims and Sufficiency of Complaint

27 The merits of plaintiff’s substantive claims and the sufficiency of the complaint are
28 considered here together because of the relatedness of the two inquiries. The court must consider

1 whether the allegations in the complaint are sufficient to state a claim that supports the relief
2 sought. See Danning, 572 F.2d at 1388; PepsiCo, Inc., 238 F.Supp.2d at 1175. Here, the merits
3 of the claims and sufficiency of the complaint favor entry of default judgment.

4 Plaintiff brings a single cause of action for breach of contract. Plaintiff asserts that
5 Illinois law should be applied to this matter because the contract/insurance policy at issue in this
6 matter was issued by ZAIC from its principal place of business in Illinois, and because payments
7 by defendants were to be made to ZAIC, the breach for non-payment occurred in Illinois, and
8 ZAIC's damages for the breach occurred in Illinois. ECF No. 1 at 2. ZAIC argues its
9 performance of its contractual duties occurred in Illinois, and thus Illinois contract law should
10 apply in this matter. Id.

11 “In diversity jurisdiction cases, such as this one, we apply the forum state’s choice-of-law
12 rules.” KST Data, Inc. v. DXC Tech. Co., 836 F. App’x 484, 486 (9th Cir. 2020). “The burden is
13 on the party seeking to invoke foreign law; California applies its own rule of decision unless a
14 party litigant properly invokes the law of a foreign state.” McGhee v. Arabian Am. Oil Co., 871
15 F.2d 1412, 1422 (9th Cir. 1989), as amended on reh’g (Apr. 28, 1989). The applicable California
16 statute provides: “A contract is to be interpreted according to the law and usage of the place
17 where it is to be performed; or, if it does not indicate a place of performance, according to the law
18 and usage of the place where it is made.” Cal. Civ. Code § 1646. Here, plaintiff asserts in the
19 complaint “payments by Defendants were to be made to ZAIC, the breach for non-payment
20 occurred in Illinois, and ZAIC’s damages for the breach occurred in Illinois. ZAIC’s
21 performance of its contractual duties occurred in Illinois. Illinois contract law should apply in this
22 matter.” ECF No. 1 at 2. The court finds that plaintiff has met its burden of demonstrating that
23 Illinois law applies to the substantive breach of contract claim.

24 Under Illinois law, a plaintiff must plead “(1) the existence of a valid and enforceable
25 contract; (2) performance by the plaintiff; (3) breach of the contract by the defendant; and (4)
26 resultant injury to the plaintiff.” Gonzalzles v. American Express Credit Corp., 315 Ill. App. 3d
27 199, 206 (2000) (citing Gallagher Corp. v. Russ, 309 Ill. App. 3d 192, 199 (1999)). Here,
28 plaintiff’s complaint states that “At Defendants’ request, Workers Compensation insurance policy

1 no. WC-5899178-01 (which was a renewal) was issued by Plaintiff to Defendants for the policy
2 period May 1, 2014 to May 1, 2015 (the “Agreement”).” ECF No. 1 at 3. Plaintiff provided the
3 court a copy of the contract. ECF No. 13. Plaintiff performed the contract by providing workers
4 compensation insurance. ECF No. 1 at 3. Plaintiff alleges that defendant breached the contract
5 by failing to pay the \$328,833.20 owed pursuant to the terms of the Agreement (premium and
6 deductible costs), or any portion of that amount, despite being provided multiple invoices. ECF
7 No. 10-2 at 3. Plaintiff has been economically injured due to the unpaid premium and deductible
8 owed by defendant. Id. Plaintiff pled facts supporting all elements of a viable contract claim; the
9 merits of the breach of contract claim therefore favor entry of default judgment.

10 3. Factor Four: The Sum of Money at Stake in the Action

11 Under the fourth Eitel factor, the court considers the amount of money at stake in relation
12 to the seriousness of defendant’s conduct. Plaintiff seeks damages totaling \$351,972.88
13 (\$328,833.20 for the unpaid premiums, prejudgment interest of \$22,702.68, and recoverable costs
14 of suit totaling \$437.00). Wilmer Aff. (ECF No. 10-2) ¶¶ 5-14, Exhibit “A” and “B”; Horton
15 Aff. (ECF No. 10-3) ¶¶ 11-16; Exhibit “E.” “Absent an express agreement of the parties,
16 prejudgment interest is allowed by statute if the amount due is fixed or easily computed.” Crystal
17 Lake Ltd. P’ship v. Baird & Warner Residential Sales, Inc., 2018 IL App (2d) 170714, ¶ 77
18 (2018). Per 815 Illinois Comp. Stat. 205/2, when there is no interest rate cited in an agreement,
19 five (5) percent per annum can be charged on thirty days’ notice. The amount at issue is
20 proportionate to the seriousness of defendant’s conduct and this factor favors entry of default
21 judgment.

22 4. Factor Five: Possibility of Dispute Concerning Material Facts

23 The facts of this case are relatively straightforward, and plaintiff has provided the court
24 with well-pleaded allegations supporting its claims and affidavits in support of its allegations.
25 Here, the court may assume the truth of well-pleaded facts in the complaint (except as to
26 damages) following the clerk’s entry of default and, thus, there is no likelihood that any genuine
27 issue of material fact exists. See, e.g., Elektra Entm’t Group Inc. v. Crawford, 226 F.R.D. 388,
28 393 (C.D. Cal. 2005) (“Because all allegations in a well-pleaded complaint are taken as true after

1 the court clerk enters default judgment, there is no likelihood that any genuine issue of material
2 fact exists."); accord Philip Morris USA, Inc., 219 F.R.D. at 500; PepsiCo, Inc., 238 F.Supp.2d at
3 1177.

4 5. Factor Six: Whether Default Was Due to Excusable Neglect

5 Having reviewed the record before the court, the undersigned finds no indication that the
6 default was the result of excusable neglect. See PepsiCo, Inc., 238 F.Supp.2d at 1177. Plaintiff
7 served the defendant with the summons and complaint. ECF No. 6. Moreover, plaintiff served
8 defendant by mail with notice of its application for default judgment. ECF No. 10-5. Despite
9 ample notice of this lawsuit and plaintiff's intention to seek a default judgment, defendant failed
10 to defend itself in this action. Thus, the record supports a conclusion that the defendant has
11 chosen not to defend this action, and not that the default resulted from any excusable neglect.
12 Accordingly, this Eitel factor favors the entry of a default judgment.

13 6. Factor Seven: Policy Favoring Decisions on the Merits

14 "Cases should be decided upon their merits whenever reasonably possible." Eitel, 782
15 F.2d at 1472. However, district courts have concluded with regularity that this policy, standing
16 alone, is not dispositive, especially where a defendant fails to appear or defend itself in an action.
17 PepsiCo, Inc., 238 F.Supp.2d at 1177; see also Craigslist, Inc. v. Naturemarket, Inc., 694
18 F.Supp.2d 1039, 1061 (N.D. Cal. Mar. 5, 2010). Accordingly, although the court is cognizant of
19 the policy favoring decisions on the merits – and consistent with existing policy would prefer that
20 this case be resolved on the merits – that policy does not, by itself, preclude the entry of default
21 judgment.

22 7. Conclusion: Propriety of Default Judgment

23 Upon consideration of all the Eitel factors, the court concludes that plaintiff is entitled to
24 the entry of default judgment against defendant. What remains is the determination of the amount
25 of damages to which plaintiff is entitled.

26 C. Terms of Judgment

27 Plaintiff's motion for default judgment includes a proposed order seeking damages in the
28 amount of \$351,972.88 (consisting of \$328,833.20 in principal damages, \$22,702.68 in

1 prejudgment interest, and \$437.00 in costs). ECF No. 10-4. Plaintiff established the amount of
2 damages owed by Blu Homes for the unpaid insurance premium and deductible, in the amount of
3 \$328,833.20, through provision of the Wilmer Aff. ¶¶ 5-12; Exhibits "A" and "B." Plaintiff sets
4 forth the methodology of its calculation of prejudgment interest totaling \$22,702.68¹ and provides
5 evidence of its statutory costs of \$437.00 through the Horton Aff. ¶¶ 12-16; Exhibit "E." The
6 court finds the requested damages are supported.

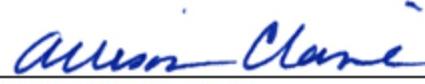
7 **IV. Conclusion**

8 For the reasons explained above, it is HEREBY RECOMMENDED that:

- 9 1. Plaintiff's motion for default judgment (ECF No. 10) be GRANTED;
10 2. The court enter judgment in the amount of \$351,972.88 in favor of plaintiff and against
11 defendant, and
12 3. This case be closed.

13 These findings and recommendations are submitted to the United States District Judge
14 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days
15 after being served with these findings and recommendations, any party may file written
16 objections with the court and serve a copy on all parties. *Id.*; see also Local Rule 304(b). Such a
17 document should be captioned "Objections to Magistrate Judge's Findings and
18 Recommendations." Any response to the objections shall be filed with the court and served on all
19 parties within fourteen days after service of the objections. Local Rule 304(d). Failure to file
20 objections within the specified time may waive the right to appeal the District Court's order.
21 Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156-57
22 (9th Cir. 1991).

23 DATED: March 22, 2022

24 
ALLISON CLAIRE
UNITED STATES MAGISTRATE JUDGE

25
26 ¹ The prejudgment interest number is calculated through February 9, 2022, the initial hearing
27 date set for this motion. The court declines to add interest through the date of these findings and
28 recommendations because the slight delay in issuance was due to the need for supplemental
briefing, which was filed March 18, 2022 (ECF No. 13).